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No. 94-1903

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

IRVING HOCHBERG, MARTA KLAJMAN, SHELLEY SCHEFFLER, FIRST CHURCH OF CHANGO, INC., individually and on behalf of all members of the FIRST CHURCH OF CHANGO, INC.,

Petitioners,

—against—

MAYNARD HOWLETT, EMANCIPATION, and CULT AWARENESS NETWORK, NY-NJ, C.F.F., INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT MAYNARD HOWLETT IN OPPOSITION

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Questions Presented*

1. Whether the United States Court of Appeals for the Second Circuit properly held that the district court did not abuse its discretion in dismissing petitioners' amended complaint pursuant to Fed. R. Civ. P. 37(b)(2)(C) based on petitioners' willful refusal to produce documents or appear for their depositions in violation of the district court's oral order entered on the record November 3, 1993, entered as a written order on December 10, 1993 *nunc pro tunc* (the "November 3, 1993 Order")?

2. Whether the United States Court of Appeals for the Second Circuit properly held that the district court did not abuse its discretion, in balancing the First Amendment rights of the members of petitioner First Church of Chango (the "Church") to privacy and protection of their religious associations with the competing Fifth Amendment rights of respondent Maynard Howlett ("Howlett") to due process in the conduct of discovery and preparation of an adequate defense in a private litigation, by crafting a narrowly drawn protective order which directed petitioners to furnish the names and addresses of present and former Church members to Howlett's counsel, and the names only to Howlett?

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* Petitioners also seek certiorari with regard to the court of appeals' affirmance of the district court's order dated November 30, 1992, granting summary judgment dismissing the amended complaint against defendant Cult Awareness Network, NY-NJ, C.F.F., Inc. Inasmuch as the district's court's grant of summary judgment in favor of CAN does not affect respondent Howlett, this brief does not address that portion of the petition.

Parties

Petitioners are Irving Hochberg, Marta Klajman and Shelley Scheffler, who claim to be members of the Church, and The Church. The Church claims a total membership of 26 persons, all of whom are New York residents. The members of the Church allegedly practice a variant of the Santeria religion.

Respondent Howlett is an individual who, at the time this action was commenced, resided in New Jersey.

TABLE OF CONTENTS

	PAGE
Questions Presented	i
Parties	ii
Table of Authorities	iv
Statement of the Case	1
Reasons for Denying the Writ	2
Conclusion	4
Addendum	1a

TABLE OF AUTHORITIES

Cases PAGE

Layne & Bowler Corp. v. Western Well Works, 261 U.S. 387 (1923) 3

Marshall v. Bramer, 828 F.2d 355 (6th Cir. 1987)..... 3

National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639 (1975) 3

Rice v. Sioux City Cemetery, 349 U.S. 70 (1955)..... 3

Seattle Times v. Rinehart, 467 U.S. 20 (1983)..... 3

Statutes and Rules

Sup. Ct. R. 10.1 2

Statement of the Case

Petitioners brought this action alleging libel and conspiracy to interfere with their First Amendment rights. The action is based upon 21 anonymous allegedly defamatory letters received by certain other members of The Church over a three-month period in Spring 1991.

Howlett's answer denied the essential allegations of the amended complaint (including the allegations that Howlett wrote or published the 21 letters) and asserted numerous affirmative defenses, including the defenses that the allegedly defamatory statements are true, that the allegedly defamatory statements are expressions of opinion, and that the allegedly defamatory statements are privileged and protected under the First Amendment.

Despite his own cooperation with petitioners' discovery requests, Howlett tried unsuccessfully for over a year and one half to obtain documents from petitioners pursuant to his Fed. R. Civ. P. 34 Request, which petitioners refused to produce. Howlett also tried unsuccessfully for nearly a year to procure petitioners' appearance at depositions so that he could learn the purported basis for the serious and harmful allegations asserted against him in the amended complaint.

Petitioners' intransigence forced Howlett to move for discovery sanctions pursuant to Fed. R. Civ. P. 37 on two separate occasions. On November 3, 1993, upon the first Rule 37 motion, the district court heard argument on the record for longer than two hours and (a) granted in part petitioners' motion for a protective order, and directed that the names and addresses of all present and former members of the Church be disclosed to Howlett's counsel, and that the names only be furnished to Howlett, in order to assist counsel in preparing for depositions, (b) directed petitioners to comply with Howlett's discovery requests (as modified by the district court's rulings concerning relevance) on dates set by the district court.

Petitioners did not produce any documents as ordered by the district court, nor did petitioners appear for their depositions as scheduled pursuant to the district court's order.

Howlett's second Rule 37 motion, which was based on petitioners' willful failure to appear for their depositions or produce documents as required by the November 3, 1993 Order, resulted in dismissal of the amended complaint by the district court on April 28, 1994.

The court of appeals affirmed the district court, holding that:

> Judge Patterson balanced the competing interests of the parties and entered an appropriate protective order. We conclude that he acted within his considerable discretion in ordering discovery. Moreover, we note that appellants' refusal to comply with the court's order included matters not legitimately subject to a claim of confidentiality. It is thus beyond doubt that appellants acted willfully, and Judge Patterson did not abuse his discretion in dismissing their complaint with respect to Howlett.

(Appendix to Petition, A5)

Reasons for Denying the Writ

This case involves none of the "special and important reasons" warranting a writ of certiorari. *See* Sup. Ct. R. 10.1. This case does not involve a conflict among the circuit courts, a departure from the accepted and usual course of judicial proceedings or sanction of such a departure by a lower court, *see* Sup. Ct. R. 10.1(a), or a court of appeals decision on an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court, *see* Sup. Ct. R. 10.1(c), as to call for an exercise of the Court's discretionary review.

It is well-settled that certiorari should issue only in cases involving "principles the settlement of which is of importance to the public as distinguished from that of the parties" and in cases of conflict between the circuit courts. *Rice v. Sioux City Cemetery*, 349 U.S. 70, 79 (1955), *quoting*, *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923). This is not such a case.

Rather than involve any issues of importance to the public, this case involves only the dispute between the parties concerning the district court's exercise of discretion in controlling discovery and entering sanctions for non-compliance with its orders. Moreover, the decisions below of the district court and the court of appeals are both clearly correct.

While petitioners claim that the court of appeals sanctioned the district court's approach which conflicted with decisions of this Court, in fact there was no such conflict. This Court has recognized that "[t]he trial court is in the best position to weigh fairly the competing needs and interests of the parties affected by discovery," even in cases involving claimed constitutional rights. *Seattle Times v. Rinehart*, 467 U.S. 20, 26 (1983). In this case, the district court properly balanced petitioners' First Amendment rights consistent with this Court's First Amendment jurisprudence with respondent's Fifth Amendment rights in a carefully drawn order which granted in part petitioners' motion for a protective order. *Cf. Marshall v. Bramer*, 828 F.2d 355, 360 (6th Cir. 1987). When petitioners nevertheless willfully refused to appear for their depositions or to produce documents in compliance with the district court's order, the district court acted well within its discretion in dismissing the action, and the court of appeals acted properly in affirming that dismissal. *See National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 642 (1975).

Conclusion

This case involves the district court's carefully fashioned discovery order which appropriately dealt with the First Amendment issues raised by petitioners, and the district court's well-justified dismissal of the action based on petitioners' willful failure to comply with that discovery order. No issues of general or interest or importance are raised, and the only parties affected by the decision below are the litigants. We respectfully submit that certiorari should be denied.

Respectfully submitted,

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ADDENDUM

Addendum

Constitutional Provisions, Statutes, and Rules Involved

U.S. Const. amend. I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War of public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fed. R. Civ. P. 37(b)(2):

> If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
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> * * *

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any party thereof, or rendering a judgment by default against the disobedient party.